HUMAN RIGHTS QUARTERLY

Labor Rights Provisions in US Trade Law: "Aggressive Unilateralism"?

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Legislatively-mandated measures designed to protect the labor rights of workers in foreign countries constitute an increasingly important dimension of US human rights policy. Perhaps because those measures have been enacted under the rubric of US trade law, rather than in the context of human rights legislation, they have attracted rather limited critical (as opposed to essentially descriptive) attention from international lawyers in the human rights field.[1] But this relative neglect is unjustified. As international trade becomes even more important in a post-cold war world consisting of many additional would-be market economies, and as protectionist pressures increase in the United States and in other developed market economies, punitive and retaliatory trade measures become more attractive. This is especially true if such measures can be justified not solely by reference to economic considerations but also on human rights grounds. While measures in response to "market dumping" are a form of economic self-defense, measures to combat

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1. On the linkage between labor standards and international trade, *see generally*: Lawyers Committee for Human Rights, *A Report on Legal Mechanisms to Protect Worker Rights* (mimeo 1991); Lawyers Committee for Human Rights, *Worker Rights Under the U.S. Trade Laws* (1989); Harlan Mandel, *In Pursuit of the Missing Link: International Worker Rights and International Trade?*, 27 Colum. J. Transnat'l L. 443 (1989); International Labor Rights Education and Research Fund, *Trade's Hidden Costs: Worker Rights in a Changing World Economy* (1988) (hereinafter *Trade's Hidden Costs*); Steve Charnowitz, *The Influence of International Labour Standards on the World Trading Regime: A Historical Overview*, 126 Int'l Lab. Rev. 565 (1987); Ian Charles Ballon, *The Implications of Making the Denial of Internationally Recognized Worker Rights Actionable Under Section 301 of the Trade Act of 1974*, 28 Va. J. Int'l L. 73 (1987); Steve Charnowitz, *Fair Labor Standards and International Trade*, 20 J. World Trade L. 61 (1986); Gote Hansson, *Social Clauses and International Trade* (1983); Philip Alston, *Commodity Agreements: As Though People Don't Matter*, 15 J. World Trade L. 455 (1981); and Gus Edgren, *Fair Labour Standards and Trade Liberalization*, 118 Int'l Lab. Rev. 523 (1979).

Human Rights Quarterly 15 (1993) 1–35

"social dumping" can be defended in largely altruistic or humanitarian terms.[2]

The policy assumptions embodied in current US "international worker rights" legislation (a phrase which, at least to a non-American, is surely ungrammatical) as well as the manner in which that legislation is being implemented are highly questionable from an international law perspective. Specifically, there are several matters which warrant careful examination by proponents of an international rule of law in relation to both trade and human rights matters. They include: the use of the rhetoric but not the substance of "international standards"; the application to other countries of standards that have not been accepted by those countries and which are not generally considered to be part of customary international law; the invocation of international instruments that the United States itself has not ratified; and the neglect of existing and potential international mechanisms for achieving comparable objectives. In brief, the current approach to worker rights would appear to be incompatible with some of the key principles on which the emerging international human rights regime is, or should be, premised. US trade law since the mid-1980s has been characterized by some commentators as an exercise in "aggressive unilateralism."[3] There are strong grounds for applying a similar label to the worker rights provisions of the relevant legislation.

This article suggests the need for a much closer, and considerably more critical, examination of the US legislation and the related implementing machinery than has been undertaken to date. It concludes by suggesting some reforms that could make existing approaches more compatible with efforts to develop an effective international labor rights regime.

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2. For example, Owen Bieber, President of the United Auto Workers, in Congressional testimony in support of worker rights legislation, stated that:

> There are many countries around the world that have built an advantage in international trade by preventing workers from exercising the right to organize and bargain with employers, by failing to adopt minimum standards for conditions of work, or by allowing forced or child labor. The US should officially repudiate [sic] any trading advantage obtained in this way and retaliate against the exports of such countries.

Mastering the World Economy: Hearings Before the Senate Committee on Finance, 100th Cong., 1st Sess. 59–60 (1987).

"Market dumping" is generally used to refer to the practice of selling goods in international trade at a lower price than the cost of production and marketing, with a view to destroying competition in the target country or artificially stimulating a market which, when subsequently consolidated, is expected to support a higher price which exceeds actual production and marketing costs. "Social dumping," on the other hand, usually refers to the practice of relying upon low "social" costs (whether in the form of low wages, poor working conditions, or neglect of basic environmental, safety, or health standards) to produce goods that can then be sold in another market at a price which is well below the cost of production in that market, primarily because producers in that market would not be permitted to tolerate such low social standards.

3. *Aggressive Unilateralism: America's 301 Trade Policy and the World Trading System* (Bhagwati & Patrick eds., 1990).

I. AN OVERVIEW OF THE PRINCIPAL WORKER RIGHTS PROGRAMS

Each of the principal worker rights programs is quite complex in terms of the procedures prescribed, the coverage of the legislation, the consequences that may follow from an unfavorable determination, and the results achieved to date. Since each has been described and analyzed in detail elsewhere,[4] the overview that follows seeks only to identify in broad outline the main features of the programs with which this article is concerned.

For the purposes of the present analysis, four programs are of particular relevance. The first consists of the preferential trade access arrangements established in connection with the Generalized System of Preferences (GSP).[5] Under the 1974 Trade Act, privileged trading partner status could not be accorded to any country which was, *inter alia*, communist, uncooperative in international drug control efforts, or terrorist-abetting.[6] Under the Generalized System of Preferences Renewal Act of 1984 (the "Renewal Act") various other grounds for exclusion from the program were added.[7] As a result of one of the most important additions, the President may not designate as a GSP beneficiary any country which "has not taken or is not taking steps to afford internationally recognized worker rights" to its own workers.[8]

The second program is the Caribbean Basin Initiative which provides for duty-free entry for all specified products from any of the twenty-seven countries that are eligible for beneficiary status.[9] In determining whether to grant duty-free treatment to the country concerned, the President may take account of the extent to which workers are afforded "reasonable workplace conditions and enjoy the right to organize and bargain collectively."[10]

The third program addresses the Overseas Private Investment Corporation (OPIC),[11] whose purpose is to insure US investment in foreign countries against losses due to political turmoil or nationalization. OPIC is not permitted to participate in a project unless the government of the country

4. See especially Lawyers Committee (1991) and Lawyers Committee (1989), *supra* note 1.
5. *See generally* Ballon, *supra* note 1, 78–82; and Lawyers Committee (1991), *supra* note 1, 2–19.
6. *See* § 502 of the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 2066 (1975), codified at 19 U.S.C.A. § 2462 (b)(1)-(6) (1980).
7. Enacted as Title V of the Trade and Tariff Act of 1984, Pub. L. No. 98-573 § 502, 98 Stat. 3020, codified at 19 U.S.C.A. § 2462 (West Supp. 1988).
8. Trade Act of 1974, *supra* note 6, at § 502 (b)(7).
9. *See generally* Ballon, *supra* note 1, 75–78; and Lawyers Committee (1991), *supra* note 1, 19–22.
10. Caribbean Basin Economic Recovery Act, 19 U.S.C. § 2702 (c)(8) (Supp. IV 1986). In the view of one commentator, "[b]ecause of its general wording and discretionary language, the potential impact of the CBI provision does not appear great." Mandel, *supra* note 1, at 446 n.16. From the perspective of the present author, it is precisely because of its flexibility and open-endedness that the provision is very troubling.
11. *See generally* Ballon, *supra* note 1, 82–84; and Lawyers Committee (1991), *supra* note 1, 22–26.

concerned is "taking steps to adopt and implement laws that extend internationally recognized worker rights" to its workers.[12]

Under the fourth program, created pursuant to the Omnibus Trade and Competitiveness Act of 1988,[13] the systematic denial of internationally recognized worker rights constitutes an unreasonable trade practice,[14] and a country engaging in such practices may be subjected to a wide variety of sanctions imposed by the executive branch without further reference to the Congress and without the right of appeal. Thus, for example, at the direction of the President, the US Trade Representative is empowered, in accordance with section 301 of the Trade Act, to suspend, withdraw, or prevent the application of any benefits flowing from trade agreement concessions, to impose duties or other import restrictions on goods, and to impose fees or restrictions on services. Violations of the rights in question can, in other words, lead to the cancellation or suspension of a country's most-favored nation trading status as a whole, or to the revocation of such status for particular products. It is not necessary for the target of the sanctions to be the same as the sector responsible for the violations giving rise to the sanctions. The President may also deny licenses issued by federal regulatory agencies to foreign suppliers of services.[15]

In the present context, the 1988 Trade Act provisions are of the greatest significance. The consequences of their application may be dire for the target country; the procedures established are far from being transparent; and the discretion vested in the president is immense. Moreover, whereas the provisions of the first three programs are potentially applicable only to developing countries, those of the 1988 Act may be applied to any country (provided only that the offending practices result in a burden to, or restriction upon, US commerce).

While all of these programs give rise to concern from an international human rights perspective, especially troubling is the potential for existing concerns to be exacerbated significantly in the years ahead. This could happen in two ways. The first would be for the Congress to continue to adopt more such programs, some of which might perhaps be even less satisfactory than the present model. The second would be for other countries to begin to adopt comparable legislative approaches in the context of their trade policies. The fear that other countries will eventually retaliate in this

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12. Overseas Private Investment Corporation Amendment Act of 1985, Pub. L. No. 99-204, 99 Stat. 1670 (1985), codified at 22 U.S.C.A. § 2191a (a)(1) (West Supp. 1988).
13. *See generally* Ballon, *supra* note 1, 88–127; and Lawyers Committee (1991), *supra* note 1, 26–31.
14. Trade Act of 1974, *supra* note 6, as amended by the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988) § 1301, codified at 19 U.S.C.A. § 2411 (a).
15. *Id.* at § 301 (b)(2) and § 301 (c)(1)(A)-(B).

fashion has been mooted by a number of trade experts,[16] and was one of the reasons cited by the Reagan Administration in opposing worker rights provisions in a revised Trade Bill.[17]

II. COMPARING THE WORKER RIGHTS PROGRAMS WITH SOME OF THE ASSUMPTIONS UNDERLYING THE INTERNATIONAL HUMAN RIGHTS REGIME

The various trade policy issues raised by these programs are important and far-reaching, but they are not the focus of the present analysis.[18] Rather, the objective is to examine the compatibility of the principles reflected in the worker rights programs with some of the major assumptions on which the international human rights regime is constructed. Among those assumptions are the following:

(a) international endeavors to promote respect for human rights should be based upon internationally recognized standards;
(b) especially in a punitive context, international human rights standards should be applied only to the extent that the target state is bound by way of treaty or customary law provisions;
(c) normative consistency between the standards being applied by one government to other governments and the relevant international standards should be sought as far as possible;
(d) mechanisms for sanctioning violations of human rights should be based upon reasonably clear criteria, should follow fair and consistent procedures, and should avoid double standards as far as possible.

We turn now to evaluate the extent to which the various worker rights programs are consistent with each of these assumptions.

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16. *E.g.*, Helen Milner, *The Political Economy of U.S. Trade Policy: A Study of the Super 301 Provision*, in *Aggressive Unilateralism*, *supra* note 3, 163, 180; John McMillan, *Strategic Bargaining and Section 301*, in *Aggressive Unilateralism*, *supra* note 3, at 203, 214.
17. *Presidential Authority to Respond to Unfair Trade Practices: Hearings on Title II of S.1860 and S.1862 Before the Senate Committee on Finance*, 99th Cong., 2d Sess., 39, 52 (1986) (testimony of C. Yeutter, US Trade Representative).
18. One careful analysis has concluded that the 1988 Trade Act provisions concerning worker rights could well be in violation of US obligations as a signatory to the General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. pts. 5–6, T.I.A.S. No. 1700, 55 U.N.T.S. 194; the current version of the Agreement is reprinted in *General Agreement on Tariffs and Trade, Basic Instruments and Selected Documents* (Supps. I-XXXIII) (1987). The most-favored-nation (MFN) clause (article 18) prohibits discriminatory trade and tariff practices. It has been suggested that:

> Without an internationally recognized basis on which to impose trade sanctions, any United States action under Section 301 to address the denial of worker rights by a fellow signatory would appear to constitute a substantive violation of GATT's MFN clause, or at least a

A. Internationally Agreed Upon Standards

The Brandt Commission Report of 1980, which surveyed the entire gamut of North-South relations, provided significant support for the general principle of linking respect for labor standards to enhanced trading opportunities. Its recommendation was not unqualified, however. Rather, it was based explicitly on the premise that "[f]air labor standards should be internationally agreed upon in order to prevent unfair competition and to facilitate trade liberalization."[19] When, in 1974, the United States Congress first sought to link the two issues, it acknowledged the desirability of doing so within a multilateral framework.[20] It has continued to propose multilateral action, most notably in the context of the Uruguay Trade Round in 1986.[21] But these initiatives have garnered little, if any, significant support from other states, most of which have assumed the proposals to be essentially protectionist in motivation.[22]

Nevertheless, the very use of the qualifier "internationally recognized" to describe the relevant "worker rights" would seem to imply clear recognition of the desirability of avoiding the application of subjectively determined norms to the countries that might be affected by the US legislation. This impression is further reinforced by the list of relevant rights which, according to the Renewal Act,[23] include;

(1) the right of association;

(2) the right to organize and bargain effectively;

(3) a prohibition on the use of any form of forced or compulsory labor;

(4) a minimum age for the employment of children; and

(5) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

The specific rights in question are not defined at all for the purposes of the Caribbean Basin Initiative,[24] while the OPIC legislation refers to the definition contained in the Renewal Act.[25] The Omnibus Trade and Com-

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procedural evasion of GATT's dispute resolution mechanism. Such an action by the United States could invite retaliatory trade action by the other signatory and its allies.

Lawyers Committee (1989), *supra* note 1, at 66 (footnote omitted). For a careful and persuasive analysis of the circumstances under which it might be appropriate for the relevant GATT rules to be ignored or broken, see Robert Hudec, *Thinking About the New Section 301: Beyond Good and Evil*, in *Aggressive Unilateralism*, *supra* note 3, at 113.

19. *Report of the Independent Commission on International Development Issues, North-South: A Programme for Survival* 182–83 (1980).
20. Trade Act of 1974, *supra* note 6, § 121 (a)(4).
21. GATT doc. Prep. Com. (86) W/43 (25 June 1986).
22. *See generally*, Charnowitz, *Fair Labor Standards and International Trade*, *supra* note 1.
23. Trade Act of 1974, *supra* note 6, § 502 (a)(4), 19 U.S.C. § 2462 (a)(4).
24. *See supra* note 10.
25. *See supra* note 12.

petitiveness Act also uses a definition which, for all intents and purposes, is identical to that contained in the Renewal Act.[26]

From the perspective of international human rights law the list of worker rights is a very familiar one. The terminology is essentially that developed by the International Labor Organization (ILO), which has evolved a detailed set of "international labor standards" or "labor rights" which could readily be used for the purpose of giving substance to the Renewal Act's rather cryptic formulations.[27] But the US legislation carefully eschews any reference to the ILO standards per se. Indeed, it would not seem far-fetched to speculate that the grammatically dubious phrase "worker rights" was created with a view to avoiding the use of terms such as "labor rights" or "labor standards" which might too readily have conjured up visions of existing ILO standards. Rather, the legislation "mirrors"[28] the issues dealt with in the principal ILO human rights conventions without specifically endorsing the actual formulations used therein. As one commentator has defensively noted, "the standards reflect the legitimate concerns embraced by the most fundamental ILO Covenants [sic]."[29]

But the problem is that the reflection provided in the legislative mirror is a distorted one. In the first place, the list of standards is artificially restricted in that it does not cover all of the issues internationally recognized as being necessary to ensure the basic human rights of workers.[30] A notable omission, for example, is the issue of non-discrimination in employment, a key labor rights concern designed, *inter alia*, to ensure that a government does not itself exclude from employment, or permit the exclusion by other employers, of individuals on the basis of "race, colour, sex, religion, political opinion, national extraction or social origin."[31] This is not solely a measure designed to eliminate the forms of gender- or race-based discrimination with which we are familiar in countries such as Australia and the United States; it also is of major significance in combatting oppression in the form of consistently discriminatory labor market practices that penalize workers on the basis of their political beliefs or their ethnic origins.

In the second place, the form in which the standards are stated is so bald and inadequate as to have the effect of providing a carte blanche to

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26. *See supra* note 14.
27. *See generally*, Nicolas Valticos, *Le Droit International du Travail* (1983).
28. "Internationally recognized worker rights, such as those included in the GSP and OPIC legislation, mirror those spelled out in bedrock International Labor Organization (ILO) Conventions." *Trade's Hidden Costs*, *supra* note 1, at 6.
29. Mandel, *supra* note 1, at 460.
30. *See* text accompanying *infra* notes 144–45.
31. Article 1(a) of ILO Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation, adopted June 25, 1958, entered into force June 15, 1960; reprinted in United Nations, *Human Rights: A Compilation of International Instruments* 84 (1988).

the relevant US government agencies, thereby enabling them to opt for whatever standards they choose to set in any given situation. Most academic commentators, a substantial majority of whom are in favor of the worker rights initiatives,[32] have simply glossed over this issue of the subjectivity of the US standards and the fact that the standards bear no necessary or even authentic relationship to those of the ILO. Thus, for example, a nongovernmental group formed specifically for the purpose of promoting the application of the worker rights legislation offers the following justification for the standards used:

> The labor rights and standards enumerated in the legislation are the ones that most governments claim on paper to support; most of the violators have ratified ILO conventions to this effect. Hence, this is not a case of imposing US regulations; they are internationally recognized standards to which most countries are bound by international law.[33]

The problem is, as noted below,[34] that many of the "violators" have not in fact ratified the ILO standards and that, in any event, the US legislation does not contain any detailed standards at all. It simply misappropriates some of the terminology developed by the ILO, without involving any commitment whatsoever to make use of the specific standards that have been drawn up, after very careful negotiations, within the ILO framework.

Another commentator, Steve Charnowitz, recognizes that "what constitutes 'unfair' working conditions presents a thorny problem of definition."[35] But having invoked the detailed history of ILO standards in support of the concept of "worker rights," he then seeks to distance the US program from that background:

> One could define unfair conditions to be any which do not meet the standards of the ILO. But such a definition has the undesirable consequence of putting just about every nation in the doghouse on at least one of the ILO's 161 Conventions.[36]

No reference is made to the easy way out of this dilemma which is to link any such program to that group of rights which the ILO itself has designated as constituting "basic human rights."[37] Instead, Charnowitz simply rejects the possibility of establishing "one set of standards that would be acceptable to all nations"[38]—a proposition that contradicts the argument used by other

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32. For a negative view, see Ballon, *supra* note 1.
33. *Trade's Hidden Costs*, *supra* note 1, at 8.
34. *See* text accompanying *infra* notes 70–72.
35. Charnowitz, *Fair Labor Standards and International Trade*, *supra* note 1, at 68.
36. *Id.*
37. *See* text accompanying *infra* note 144.
38. Charnowitz, *Fair Labor Standards and International Trade*, *supra* note 1, at 69 (offering the justification that "the nations of the world do not share a common set of values").

proponents who defend the programs on the grounds that the standards already enjoy widespread international support.[39]

But Charnowitz's rejection of the feasibility of universal standards does not prevent him from concluding that "it *may* be possible for the democratic nations to agree to *a* definition of fairness" based on the principles that: (1) "the labor market should operate under voluntary choice, not coercion," and (2) "there should be a floor for workplace conditions below which no nation can go."[40] But this purported solution does little more than reveal the weaknesses of virtually any set of standards not based on those adopted by the ILO. Leaving aside the somewhat contentious issue as to which nations are to be deemed "democratic" and how and where they might get together to agree, it is apparent that the proposed definition of "fairness" would be essentially subjective and devoid of precise content. The principal effects of such a definition would seem to be to rationalize the rejection of ILO standards and to create alternative standards which offer extensive opportunities for definitional flexibility. The consequences of such subjectivity are perhaps best illustrated by reference to two examples: child labor and freedom of association.

1. Child Labor

One of the requirements of some of the US legislation is "a minimum age for the employment of children."[41] During the Congressional debates on the legislation,[42] it was suggested that, in this case, the sponsors had in mind ILO Convention No. 5, which was adopted in 1919.[43] But that Convention is far more limited in scope than those who see it as a basis for attacking the general problem of the exploitation of child labor can possibly be aware. Its application is limited to "industrial undertakings" and the government concerned is authorized to "define the line of division which separates industry from commerce and agriculture."[44] Family businesses are exempted from the provisions,[45] and special lower age limits are set for both

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39. *See, e.g., Trade's Hidden Costs, supra* note 1, at 5–9.
40. *Id.*
41. *E.g.*, 19 U.S.C. § 2462(a)(4).
42. Rep. Don Pease (Ohio) indicated that the formulations contained in the legislation that he was co-sponsoring were based on the following ILO Conventions: Hours of Work (Industry) Convention, of 1919 (No. l); Minimum Age (Industry) Convention of 1919 (No. 5); Right of Association (Agriculture) Convention of 1921 (No. 11); Right to Organize and Collective Bargaining Convention of 1949 (No. 98); Abolition of Forced Labour Convention of 1956 (No. 105); and Minimum Wage-Fixing Convention of 1970 (No. 131). *See* 133 Cong. Rec. H1499 (daily ed. 19 Mar. 1987).
43. The Convention is reprinted in International Labour Organization, *International Labour Conventions and Recommendations 1919–1981* 22 (1982).
44. *Id.* at art. 1.
45. *Id.* at art. 2.

Japan and India.[46] The Convention was rendered effectively obsolete by a revision adopted in 1937,[47] which in turn was revised in 1973.[48] The standards specified in the latter Convention (No. 138) are complex and quite detailed. They provide for the possibility of different minimum ages in different occupations and under different circumstances, and they require the adoption of a wide range of other measures aimed at eliminating exploitative child labor.[49]

The only official US government statement as to the appropriate standards to be applied under the worker rights legislation appears to reflect the approach contained in Convention No. 138, rather than that contained in Convention No. 5 as had been proposed by the legislation's principal sponsor.[50] The relevant statement is printed in an appendix to the annual State Department Country Practices report. According to these "additional guidelines" for "reporting on worker rights":

> "Minimum age for employment of children" concerns the effective abolition of child labor by raising the minimum age for employment to a level consistent with the fullest physical and mental development of young people. In addition, young people should not be employed in hazardous conditions or at night.[51]

But even this clarification fails to mirror adequately the variety and precision of the provisions contained in Convention No. 138. It thus remains entirely unclear which standards are applicable. Moreover, it should be noted that these "additional guidelines" are provided only for the purposes of reporting by State Department officials, and the guidelines as such do not appear to have been accorded any particular standing in the context of the relevant determinations made by the US Trade Representatives, despite the fact that those reports are supposed to be taken into account.[52]

Under the circumstances, it is hardly surprising that one of the staunchest advocates of the US legislation seems largely ignorant of the complexity of the actual ILO standards. Thus, the International Labor Rights Education and Research Fund characterizes the minimum age issue as one involving "ab-

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46. *Id.* at arts. 5 and 6, respectively.
47. Minimum Age (Industry) Convention (Revised) of 1937 (No. 59), *reprinted in* International Labour Organization, *supra* note 43, at 720.
48. Minimum Age Convention of 1973 (No. 138), *reprinted in* International Labour Organization, *supra* note 43, at 730.
49. *See generally*, H.T. Dao, *ILO Standards for the Protection of Children*, 58 Nordic J. Int'l L. 54 (1989).
50. *See Hearings on Title II of S.1860 and S.1862*, *supra* note 17, at 21 (statement of Rep. Don Pease).
51. *State Department Country Reports on Human Rights Practices for 1990*, Report Submitted to the Comm. on For. Rels. US Senate and the Comm. on For. Affs. H. of Reps. by the Dept. of State, 102d Cong., 1st Sess., appendix B, 1693, 1694 (1991).
52. The GSP Subcommittee of the Trade Policy Staff Committee, which is chaired by a USTR representative, is supposed to consider the State Department's annual country reports in its deliberations. *See generally* Lawyers Committee (1991), *supra* note 1, at 6.

solute rights."[53] In its view, the result is that "[e]ither a country has child labor or it doesn"t."[54] Yet the ILO itself has acknowledged that the problem is, in effect, a relative one. Many countries, including the United States,[55] have experienced significant and continuing problems in their endeavors to eliminate child labor. Legislative measures are far from adequate for dealing with the issue and may well be entirely ineffective if not supplemented by a range of other measures.[56] An ILO study of the situation in India has even suggested that a straight-out prohibition of child labor may not always be the best strategy in the short-term:

> The possibilities for the application of the full force of legislation in the unorganized sectors where child labor is concentrated and child exploitation most pronounced are also severely limited. Even if it were possible, it may not necessarily be in the best interest of the families concerned and, to be sure, of the nation at large.[57]

2. Freedom of Association

While many other examples could be provided, one more will suffice to make the point. In responding to a complaint that worker rights were violated in El Salvador in 1989–90, the relevant US inter-agency committee characterized death squad attacks on labor leaders as violations of human rights rather than of worker rights.[58] According to a report based on interviews with the officials involved:

> The Administration's position . . . is that the definition of internationally recognized worker rights is very clear, and does not speak of basic political freedoms.[59]

While such a distinction might seem plausible to a general observer, the ILO's Committee on Freedom of Association has made it very clear that such

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53. *Trade's Hidden Costs*, *supra* note 1, at 7.
54. *Id.*
55. *E.g.*, *The Fair Labor Standards Act: Enforcement of Child Labor Provisions in Massachusetts*, General Accounting Office doc. GAO/HRD-88-54 (Apr. 1988).
56. One study concluded that the legislative approach will only yield significant results where: determined efforts are made to secure its implementation; the bureaucracy charged with responsibility for such implementation is technically and financially equipped to do so; there exists a degree of difficulty in concealing the existence of the problem; and there is relatively little to be gained from employing children rather than adults. *The Economic Roles of Children: Issues for Analysis*, in *Child Work, Poverty and Underdevelopment* 39 (Rodgers & Standing eds., 1981).
57. International Labour Organization, *Towards an Action Program on Child Labour: Report to the Government of India of an ILO Technical Mission* 29 (1984).
58. GSP Subcommittee, *1990 GSP Annual Reviews: Worker Rights Summary: El Salvador* 2 (Apr. 1991), cited in Lawyers Committee (1991), *supra* note 1, at 17 n.65.
59. *Id.* at 17–18.

acts do indeed directly contravene the right to freedom of association. In summing up its own jurisprudence it has noted that:

> A climate of violence such as that surrounding the murder or disappearance of trade union leaders constitutes a serious obstacle to the exercise of trade union rights; such acts require severe measures to be taken by the authorities.[60]

The result is that the relevant United States government agency is adopting an interpretation of the scope of the right to freedom of association which is considerably narrower than that which has long been accepted internationally. Confusion as to the scope of labor rights, both in general and specifically, would seem a very likely result of such discrepancies.

Such problems, which stem from the extraordinary vagueness of the US worker rights legislation, are only two examples of the range of comparable complexities which lie very close to the surface in the case of each of the formulations used in the legislation. As a result, it is no surprise that a comprehensive analysis of the standards actually applied by the relevant US government agencies to date concluded that the process is characterized by a total lack of normative clarity. According to the study, "it is virtually impossible to identify or predict with any certainty the standards the [Trade Policy Staff Committee] will use in future worker rights determinations."[61] For present purposes, it may be added that whatever the standards might be, they are highly unlikely to be the "internationally recognized" ones that they purport to be.

B. Application of Standards Only to States Bound Thereby

International human rights obligations, including those dealing with labor rights issues, are applicable to a given state either through the undertaking of specific treaty obligations or by virtue of customary international law.[62] If the norm in question has attained the latter status, "not only the treaty non-parties, but also the parties [can] have recourse to international law remedies not provided for in the treaties."[63] While some commentators have suggested that all of the rights recognized in the Universal Declaration of Human Rights have attained the status of customary law,[64] the more widely

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60. International Labour Office, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* 20 (3rd ed., 1985).
61. Lawyers Committee (1989), *supra* note 1, at 33.
62. *See generally*, Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989).
63. Oscar Schachter, *International Law in Theory and Practice* 178 Recueil des Cours 334 (1982–V).
64. *E.g.*, Louis Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 Am. U. L. Rev. 1 (1982). The Universal Declaration of Human Rights,

accepted view is that reflected in the *Restatement (Third) of the Foreign Relations Law of the United States*. In that view, only a rather limited number of civil and political rights are part of customary law.[65] Thus it is clear, on the basis of the *Restatement*, that none of the five categories of worker rights listed in the US legislation have attained such status. Moreover, any suggestion to the contrary would be directly at odds with the view frequently expressed by the United States over the past decade, that economic and social rights are not even to be considered as human rights, let alone as part of customary law.[66]

The only remaining possibility is that some international labor standards might have become part of general international law in the form of "general principles of law recognized by civilized nations."[67] In Meron's view, this could be the case with respect to any of the relevant rights that "have been recognized by the internal laws of most states (e.g. as a result of ratifications of the ILO's international labor conventions)."[68] However, in the case of those ILO Conventions cited by the principal sponsor of the US worker rights legislation as being the basis for the list enumerated in that legislation,[69] this approach could only be even potentially productive with respect to the conventions dealing with forced labor and freedom of association. For the remainder, the relevant convention on hours of work had achieved only forty-nine ratifications as of 1 January 1991, the relevant minimum age convention had sixty-nine ratifications, and the convention on minimum wage fixing had only thirty-four ratifications.[70] It would seem to be extremely difficult to sustain the proposition that, despite their relatively low level of ratification, the principles contained in these conventions have acquired the status of customary law.

"as an authoritative listing of human rights, has become a basic component of international customary law, binding on all states, not only on members of the United Nations." *Id.* at 17.

65. The *Restatement* lists the following rights as having attained the status of norms of customary international law:

> (a) genocide,
> (b) slavery or slave trade,
> (c) the murder or causing the disappearance of individuals,
> (d) torture or other cruel, inhuman, or degrading treatment or punishment,
> (e) prolonged arbitrary detention,
> (f) systematic racial discrimination, or
> (g) a consistent pattern of gross violations of internationally recognized human rights.

2 *Restatement (Third) of the Foreign Relations Law of the United States* § 702 (1987).

66. *See* text accompanying *infra* notes 134–36.
67. *See generally*, Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 Aust Y.B. Int'l L. 82 (1992).
68. Meron, *supra* note 62, at 98.
69. *See supra* note 42.
70. International Labour Organization, *Chart of Ratifications of International Labour Conventions* (1 Jan. 1991). The references are, respectively, to Conventions No. 1, No. 5, and No. 131.

Thus, if most of the enumerated worker rights could not, especially from an official US perspective, be considered to form part of customary law, the question arises as to the basis on which they may be invoked against the various governments concerned. The most satisfactory answer would be that these rights have been accepted in the context of treaty obligations undertaken by those governments. That answer cannot always be sustained, however, because, as already noted, many of the governments have failed to ratify or accede to the appropriate ILO Conventions,[71] or to the Covenant on Economic, Social and Cultural Rights,[72] the provisions of which could be cited as a basis for the rights in question. Thus, for example, if we take five of the most commonly cited ILO human rights conventions (Nos. 11, 98, 105, 111, and 138), we find that, as of 1 January 1991, Thailand had ratified only one (No. 105), Indonesia one (No. 98), Myanmar (Burma) one (No. 11), and Chile two (Nos. 11 and 111). South Korea, which was not then a member of the ILO, had ratified none of the Conventions. Moreover, if the relevant treaty obligations were taken as providing the justification for US action, then the actual standards contained in those treaties would have to be applied. As we have seen, this is far from being the case.

Two other arguments might be put forward as providing a legal justification of the worker rights programs. The first is that since the developing country governments have the option of voluntarily foregoing any preferential trade treatment by the United States they are not being forced to abide by the worker rights standards but merely requested to do so. However, this answer becomes clearly unsatisfactory when it is recalled that access to US markets is of critical importance for many of the countries concerned, and that it is therefore a privilege that cannot readily or lightly be foregone. Moreover, while the GSP and Caribbean Basin programs relate only to preferential treatment, Section 301 is of much wider application.

The second argument was put forward by Mandel after he concluded, in line with the analysis above, that human rights law does not provide a sufficient grounding for the US legislation.[73] The reasoning is that violations

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71. This fact has not prevented proponents of the US legislation from suggesting that "most of the violators have ratified" the relevant ILO Conventions. *Trade's Hidden Costs*, *supra* note l, at 8.
72. Although the relevant labor standards provisions of the Covenant on Economic, Social and Cultural Rights are rather briefly stated, it is generally accepted that they are to be interpreted in the light of the correlative, and far more detailed, ILO standards. *See Comparative Analysis of the International Covenants on Human Rights and International Labour Conventions and Recommendations*, 52 ILO Official Bull. 181 (1969). Nevertheless, while the US legislation is potentially applicable to every country in the world (except the United States)—i.e., some 170 or so states—the Covenant has been ratified by only a little over half of those states. The number was 104 as of 13 December 1991. *See Report of the Committee on Economic, Social and Cultural Rights on its Sixth Session*, U.N. Doc. E/C.12/1991/4, para. 1 (1991).
73. Mandel, *supra* note 1, at 455–59.

of worker rights by a state undermine the economic competitiveness of US products, thus causing economic injury to the latter and providing a justification for it to engage in retorsion.[74] While this argument is by no means implausible, it would seem to raise at least one major, and several minor, problems. The major problem is that acceptance of retorsion rather than worker rights as the basis for the programs would seem to be inconsistent not only with most of the rhetoric surrounding them but also with the clearly expressed legislative intent.[75] Linked to this is the fact that an act of retorsion would normally be pursued through very different procedures and measures than those set up under the legislation; the use of all of the trapping of a human rights measure would be unnecessary and inappropriate.

Among the minor problems would be the need, in order to justify retorsion, to show a reasonably direct relationship between the foreign practices complained of and the harm suffered in the United States. While this would probably not be difficult in certain cases, despite strong arguments to the contrary by some observers,[76] it would seem likely to restrict significantly the range of cases in which US action could be justified. Another problem is that while there is probably no obligation to exhaust alternative multilateral, or bilateral, procedures before resorting to an act of retorsion,[77] the neglect of those procedures in the field of international trade could give rise to practices and precedents which would seem inconsistent with the general thrust of the declared trade policies of the United States and the international community as a whole. Finally, the issue of proportionality might arise. While there is no clear-cut legal principle requiring proportionality in any strict sense, the use of retorsion "inappropriately and disproportionately to meet minor offences departs from . . . [the] underlying ethic of reasonableness and good faith in the mutual relations of States."[78]

Thus, if neither retorsion nor human rights offers a satisfactory basis in international law for the United States' measures, it is difficult to escape the conclusion that the United States is, in reality, imposing its own conveniently flexible standards upon other states. Such states are, in effect, being required to meet standards which are not formally binding upon them by virtue either of treaty undertakings or of customary international law. It seems most un-

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74. *See generally*, Karl Josef Partsch, *Retorsion*, in 9 *Encyclopedia of Public International Law* 335 (Bernhardt ed., 1986).
75. For a review of the legislative history, see Judith Hippler Bello and Alan Holmer, *The Heart of the 1988 Trade Act: A Legislative History of the Amendments to Section 301*, in *Aggressive Unilateralism*, *supra* note 3, at 49.
76. Ballon, *supra* note 1, at 127 (calling upon the administration "to challenge the premise that there is a significant causal relationship between foreign labor practices and the domestic economic contraction resulting from import competition.").
77. *See generally*, Lori Fisler Damrosch, *Retaliation or Arbitration—or Both?: The 1978 United States-France Aviation Dispute*, 74 Am J. Int'l L. 785 (1980).
78. Schachter, *supra* note 63, at 187.

likely that the United States would look kindly upon such an approach if it were to be targeted in similar fashion by another government.[79]

But the major harm flowing from the US Congress' failure to use internationally agreed upon standards may be to the human rights cause as a whole. As Meron has correctly noted, the attempt to hold non-parties accountable to human rights treaty norms "generates tension between the important human rights values advocated . . . and the sovereignty of non-parties. The credibility of international human rights therefore requires that attempts to extend their universality utilize irreproachable legal methods."[80]

C. Consistency with Existing International Norms

There is no doubt that the future effectiveness of efforts to promote respect for human rights within the framework of interstate relations depends to a very large extent upon the ability of the international community not only to agree upon the appropriate normative standards but also to seek to interpret those standards with as great a degree of precision and consistency as possible. In the area of worker rights, furtherance of these objectives inevitably requires a major effort to achieve, to the greatest extent possible, a normative approach which is at the very least compatible and generally consistent with that pursued by the ILO. As the preeminent international organization with expertise in this field, a multilateral institution with near universal membership, an organization based on norms and procedures which have been shaped significantly by US participation, and one whose standards have often been relied upon by the United States in the past,[81] the ILO should not be lightly circumvented or undermined.

This assumption has, from time to time, been recognized by some worker rights proponents. As noted above, a passing reference to the history of the ILO and to the relevance of its labor standards is contained in almost every discussion of the worker rights programs. Thus, for example, a House of Representatives Foreign Affairs Committee Report accompanying the 1985 OPIC amendments suggested that one indication (among several) that a

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79. Indeed, whenever it has been suggested that the prohibition, contained in various international instruments, against executing offenders who were juveniles at the time of the offense, is or should be applicable to the United States, the US government has always been very quick to point out that it is not bound by any such treaty obligations and has never accepted the principles involved. *See generally*, David Weissbrodt, *Execution of Juvenile Offenders by the United States Violates International Human Rights Law*, 3 Am. U. J. Int'l L. & Pol'y 339 (1987).
80. Meron, *supra* note 62, at 81.
81. *See generally*, Victor-Yves Ghebali, *The International Labour Organisation: A Case Study on the Evolution of U.N. Specialised Agencies* (1989).

government was serious about worker rights was membership in the ILO.[82] But despite such formal recognition of the relevance of the ILO, the procedures established for the implementation of the worker rights legislation appear to ignore, in an almost studied fashion, the various ways in which ILO norms could be taken into account.

Consistency in the interpretation of the same or very similar norms by different bodies, or even by a single body, is an inevitably elusive but nonetheless desirable goal.[83] This was recognized by the United States Employers' representative who told the International Labour Conference in 1989 that "variations . . . in the jurisprudence of the Committee of Experts," which is responsible for monitoring states compliance with their obligations under ILO conventions, "were liable to create difficulties for countries which were trying to bring their legislation into conformity with the Conventions whose ratification was [sic] under study, as well as for countries which had ratified them."[84] This warning applies with particular resonance to the interpretation of the worker rights standards contained in the US legislation. Despite the fact that those standards are invariably depicted as being linked in some way to ILO Conventions, and are specifically proclaimed to be "internationally recognized," there is no statutory obligation imposed on the agencies charged with their application to take any account whatsoever of the vast body of ILO jurisprudence which has emerged in the application and interpretation of the relevant standards. Furthermore, while the interagency subcommittee that administers the GSP program is said to take account of "findings of the . . . ILO,"[85] there is no evidence to indicate that any of the relevant agencies have, in practice, made any significant reference to the jurisprudence emanating from the ILO.[86]

The problems that may result from this neglect, or circumvention, of existing international doctrine may be illustrated by taking two examples, one relating to freedom of association, and the other to special allowances for developing countries. In relation to the former, the State Department's "guidelines" for "reporting on worker rights" indicate that the right has been defined by the ILO to include various specific sub-rights, including, for example, "the right of workers and employers to establish and join organi-

82. H.R. Rep. No. 285, 99th Cong., 1st Sess. 6 (1985), *reprinted in* 1985 *US Code Cong. & Admin. News* 2572, 2577 (1985).
83. On the importance of promoting normative consistency in the interpretation of international human rights norms generally, see Alston, *Long-Term Approaches to Enhancing the Effectiveness of United Nations Human Rights Treaty Bodies*, U.N. Doc. A/44/668 paras. 126–131 (1989).
84. Report of the Committee on the Application of Standards, in *International Labour Conference, 76th Sess., Geneva, 1989*, 26 Prov. Rec. 3, para. 9 (1989).
85. Lawyers Committee (1991), *supra* note 1, at 6.
86. See generally the detailed reviews of agency practice contained in Lawyers Committee, *supra* note 1, and Mandel, *supra* note 1.

zations of their own choosing without previous authorization."[87] In interpreting this right the ILO has had to consider a very wide range of obstacles and deterrents to enjoyment of the right in order to determine which, if any, might be compatible with the terms of the relevant ILO Conventions.[88] By failing to take account of this jurisprudence, there is a very great likelihood that the US agencies will, if they take their responsibilities seriously, evolve a different and probably inconsistent set of standards for evaluating a country's compliance.

An even more difficult problem concerns the extent to which respect for worker rights by the governments of developing countries might be judged by more relaxed standards than would be applicable elsewhere. The relationship between the quest for development and respect for human rights has long been a controversial issue in international debates. The ILO has sought to make some carefully calibrated allowances for the particular challenges that arise from the special economic and other obstacles which confront some developing countries. It has done so by including a range of "flexibility devices" in its Conventions:

> These include the possibility of ratifying Conventions in parts, the acceptance of alternative parts containing more or less strict requirements, limitations on scope, "escalator" clauses permitting the gradual raising of the level of protection or the extension of the scope of protection, temporary exceptions, and flexibility in the methods of application.[89]

By the same token, the ILO does not permit underdevelopment or related problems to be used to justify failure to observe basic human rights standards. US human rights policy is particularly unambiguous on this score. In a 1991 report to Congress, the Bush Administration reiterated an approach which echoed many similar statements made by the Reagan Administration:

> There exists a profound connection between human rights and economic development. Experience demonstrates that it is individual freedom that sets the stage for economic and social development; it is repression that stifles it. Those who try to justify subordinating civil and political rights on the ground that they are concentrating on economic aspirations invariably deliver neither.[90]

But this uncompromising stance would appear to be at odds with the rather solicitous approach to developing countries reflected in the worker

87. *See supra* note 51, at 1552.
88. See, for example, the lengthy discussion of this issue contained in Valticos, *supra* note 27, at 243–71.
89. *Report of the Director-General*, International Labour Conference, 70th Sess., 16 (1984). *See also* International Labour Organization, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 77th Sess., 22 (1990).
90. *State Department Country Reports on Human Rights Practices for 1990*, *supra* note 51, vii, xi (introduction).

rights arrangements endorsed by Congress. Under the legislation, the administration can decide that measures which might otherwise be in violation of internationally recognized worker rights are not to be considered unreasonable if they are consistent with the level of economic development of the country concerned. As the House Ways and Means Committee Report on the 1984 GSP Renewal Act noted, "[i]t is recognized that acceptable standards may vary from country to country."[91] Reviews of the practical measures taken to apply the legislation indicate consistently that very considerable "flexibility" has been shown on this basis.[92] In the case of most of the specified worker rights, however, such flexibility is inappropriate and is inconsistent with the relevant international standards. Ironically, this seems to be implicitly recognized by the state department in its guidelines for "Reporting on Worker Rights," in which it observes that "[n]o flexibility is permitted concerning the acceptance of the basic principles contained in human rights standards, i.e. freedom of association, the right to organize and bargain collectively, the prohibition of forced labor, and the absence of discrimination."[93] But while the state department reports may well reflect an approach which is entirely consistent with international law, there is no evidence that the approach followed in the practical implementation of the various worker rights legislative mandates does so.

These illustrations of the manner in which the relevant international norms are being diluted, distorted, or ignored give cause for serious concern. The application of inconsistent, and perhaps even incompatible, standards will, at least in the longer term, inevitably inject considerable confusion into debates over international labor rights and thereby significantly undermine the authoritative position currently enjoyed by the relevant ILO norms.

D. The Need for Fair and Consistent Procedures

Another concern that warrants attention in the context of any scheme that purports to use "internationally recognized" human rights standards as a basis on which potentially punitive measures might be taken is to ensure that the relevant procedures are fair and consistent, and that double standards are avoided as far as possible. These concerns have long featured prominently in criticism by American officials and academics of the United Nations' human rights programs. David Forsythe, for example, has indicated that the United Nations must exhibit "a balanced commitment to human rights" if

91. Reprinted in 1984 *US Code Cong. & Admin. News* 5112 (1984); cited in Lawyers Committee (1991), *supra* note 1, at 9.
92. *E.g.*, Lawyers Committee (1991), *supra* note 1, at 10; Ballon, *supra* note 1, at 100–07.
93. *State Department Country Reports on Human Rights Practices for 1990*, *supra* note 51, at 1694 (appendix B).

it is to warrant full US government support.[94] Similarly, a former senior administration official warned that a double standard on human rights "undermines the United Nations' moral authority—and some would say its legitimacy."[95] The concerns underlying these comments are entirely justified,[96] but they apply equally well to a national body which purports to be applying international standards.

In brief, the various procedures that have been established pursuant to the worker rights legislation leave a great deal to be desired when it comes to ensuring respect for procedural due process. While the actual procedures themselves are too diverse and complicated to warrant being described in the present context, some indication of their shortcomings can be gained from a brief review of the detailed analyses that have been undertaken by others. First, however, it is appropriate to note that the procedures do respect some of the fairness requirements that can reasonably be expected under the circumstances. The procedures include, for example, an opportunity for a country under scrutiny to make detailed submissions on its own behalf, to rebut allegations, and to participate in public hearings.[97]

The major procedural problem, however, stems from the lack of predictability of the outcome in any given case and the virtually overwhelming element of discretion that is vested in the President. Thus, it has been noted that "the executive branch has complete and ultimate authority and can inject strategic and political considerations into review decisions."[98] This point was further emphasized by the US District Court for the District of Columbia which, in dismissing a complaint under the GSP legislation on the grounds that it was not justiciable, observed:

> Given [the] apparent total lack of standards, coupled with the discretion preserved by the terms of the GSP statute itself and implicit in the President's special and separate authority in the areas of foreign policy, there is obviously no statutory direction which provides any basis for the Court to act.[99]

The existence of such unfettered discretion vested in the decisionmaker is far from being ideal in a situation in which one state's human rights practices are being judged by another.

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94. David Forsythe, *The United States, the United Nations, and Human Rights*, in *The United States and Multilateral Institutions: Patterns of Changing Instrumentality and Influence* 261, 283 (Karns & Mingst eds., 1990).
95. Richard Williamson, *The United Nations: A Place of Promise and of Mischief* 118 (1991).
96. For a discussion that places the double standards issue in its proper perspective, see Thomas M. Franck, *Nation Against Nation* ch. 12 (1985).
97. The relevant procedures are laid down in the implementing regulations, 15 C.F.R. § 2006.3 (a)-(b) (1991).
98. *Id.* Mandel notes, however, that a small element of accountability is introduced by the requirement contained in some of the legislation to the effect that a determination, and the basis on which it was made, must be reported to Congress. *Id.* at n.134 and n.144.
99. *International Labor Rights Education and Research Fund v. Bush*, 752 F. Supp. 495, 497 (D.D.C. 1990).

One of the key problems would appear to be the open-endedness of the requirement imposed upon other states by the legislation. To take the example of the GSP legislation, the President shall not designate a country as a beneficiary "if such country has not taken or is not taking steps to afford its workers internationally recognized worker rights."[100] Under the OPIC legislation the language is similar, although expressed in the affirmative.[101] Whether by accident or design, the yardstick is thus very close to that used in the International Covenant on Economic, Social and Cultural Rights, article 2(1) of which requires states parties "to take steps . . . with a view to achieving progressively the full realization of the rights recognized."[102] In an effort to give substance to that standard, the Committee on Economic, Social and Cultural Rights has observed, in the context of a "general comment," that

> while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the State concerned. *Such steps should be deliberate, concrete and targeted as clearly as possible* towards meeting the obligations recognized in the Covenant.[103]

No comparable effort appears to have been taken to give greater specificity to the equivalent requirement in the worker rights legislation. To the contrary, experience indicates that the relevant US government agencies have been prepared to accept undertakings of a very vague and general nature as evidence that appropriate steps are being taken. The agencies have failed to follow-up undertakings that subsequently failed to materialize.[104] Even when the standard used is somewhat stronger, as in section 301—the government concerned must have taken, or be taking, "actions that demonstrate a significant and tangible overall advancement" in protecting worker rights[105]—the emphasis in practice has been on the word "overall," thus permitting a wide range of more and less relevant factors to be taken into account.

As a result, virtually all available analyses of the actual approach to implementation have concluded that political factors are generally the overriding consideration in determining the outcome of cases. Thus, one review of the Reagan administration's decisions to terminate GSP and OPIC status for Nicaragua, Romania, Ethiopia, Chile, and Paraguay concluded that hu-

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100. 19 U.S.C. § 2462(b)(7) (emphasis added).
101. 22 U.S.C. § 2191a(a)(1).
102. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No.16, at 49, U.N. Doc. A/6316 (1966).
103. General Comment No.3, *in Committee on Economic, Social and Cultural Rights, Report on the Fifth Session*, U.N. Doc. E/1991/23, Annex III, para. 2 (1990) (emphasis added).
104. Lawyers Committee (1991), *supra* note 1, at 9–11 (*see especially* n.37, citing a case involving Malaysia); and Mandel, *supra* note 1, 470–72 (*see especially* n. 151, citing a case involving South Korea).
105. Trade Act of 1974, *supra* note 6, § 2411(d)(3)(c)(i)(1).

man rights factors had been of only minor importance in the decisions taken.[106] Instead "strategic, or national security considerations" were determinant.[107] This view is strengthened by the fact that, at the same time as these states were penalized, the President found that worker rights practices were satisfactory in El Salvador, Guatemala, Haiti, Singapore, Suriname, and The Gambia.[108]

Moreover, the procedures followed exacerbate the problem by making it extremely difficult to know the grounds on which a decision is taken. Thus, for example, the Lawyers Committee for Human Rights, in its 1989 study, noted that the Trade Policy Staff Committee, one of the principal agencies involved, "issues only terse and conclusory press releases concerning the results of its General and Annual Reviews of workers rights."[109] Such press releases often "fail to address many of the petitioner's central allegations," a practice which, in "addition to denying a fair adjudication, . . . fails to offer clear guidance to potential petitioners and respondent beneficiary countries alike as to what factors the agency considers relevant."[110] According to the same analysis, the sources of information available are inadequate in many respects, as a result of which "the agency appears to accept legal provisions or executive pronouncements that grant worker rights at face value,"[111] rather than looking in any depth at the situation in practice.

Another objection to the procedures is the absence of any opportunities to challenge the President's decision. Congress is, in the view of the Lawyers Committee, effectively precluded from reviewing decisions because the procedure followed "fails to provide [it] with an adequate basis to oversee the administration of the worker rights provision."[112] Unlike interpretations adopted by ILO commissions of inquiry, which may be challenged in proceedings before the International Court of Justice,[113] determinations under the US legislation are not judicially reviewable.[114]

A further problem with the procedures is the lack of human rights expertise available to the decisionmaking bodies. The office of the US Trade Representative, which is the key agency in this area, is primarily concerned with the promotion of US trade opportunities. It does not consider itself a human rights agency,[115] and would probably be thought by most observers not to be in a good position from which to act objectively in worker rights

106. Mandel, *supra* note 1, at 463.
107. *Id.*
108. Lawyers Committee (1989), *supra* note 1, at 25.
109. *Id.* at 44.
110. *Id.* at 28.
111. *Id.*
112. *Id.*
113. Constitution of the ILO, art. 29, *in Constitution of the International Labour Organisation and Standing Orders of the International Labour Conference* (1989).
114. Mandel, *supra* note 1, at 468 and 470.
115. Lawyers Committee (1991), *supra* note 1.

matters. Even where inputs are sought from a range of different agencies, as is the case with the GSP Subcommittee, there is apparently no representative with human rights expertise.[116]

This situation stands in marked contrast to the various procedural safeguards which exist in relation to proceedings in the ILO context. While far from perfect, the relevant safeguards at least seek to promote fairness, impartiality, objectivity, and transparence in the process of assessing a government's compliance with accepted standards. The importance of these characteristics was eloquently underscored in an address by the US Secretary of Labor, Elizabeth Dole, to the International Labour Conference in June 1989:

> The ILO must continue to promote and protect human rights and the rights of workers in every corner of the globe. The strength of the ILO, however, lies not just in the legal obligations undertaken by its Members. More fundamentally, its strength derives from its moral force among governments, workers and employers. But, this moral force in turn depends upon the ILO's strict adherence to its founding principles, and to its continued impartial role in supervising the application of its international standards. Respect for such due process is fundamental, because it is nothing more than—or less than—a respect for law. Without such respect, the ILO will lose its integrity and purpose.[117]

The same sentiments could appropriately be adapted as a basis upon which to impugn the procedures followed in implementing the US worker rights legislation.

III. ASSESSING OBJECTIONS TO THE WORKER RIGHTS LEGISLATION

A. How Have Human Rights Groups Reacted?

Various US-based nongovernmental human rights groups have voiced their support for the worker rights initiatives.[118] As far as I am aware, virtually all of those groups remain supportive of the initiative and continue to believe, at least on balance, that it constitutes a valuable and potentially effective means by which the United States can encourage greater respect for human rights by other governments. At the same time, some of those groups, as well as some of the scholars who have focused on the legislation, have also acknowledged shortcomings both in the design and execution of the legislation and have put forward various proposals for reform. For the most part, however, the proposals relate to procedural improvements rather than to any major rethinking of the present approach.[119]

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116. *Id.* at 19.
117. *International Labour Conference, 76th Sess. Geneva, 1989*, 24 Prov. Rec. 6 (1989).
118. *See generally*, *supra* note 1.
119. *See, e.g.*, Lawyers Committee (1991), *supra* note 1; Mandel, *supra* note 1.

Thus, in its analysis of the various legislative programs the International Labor Rights Education and Research Fund calls primarily for more effective use of the opportunities provided by the legislation. It notes a "pressing need for the investigation and compilation of well-documented factual reports" on the worker rights situation in foreign countries; suggests that greater publicity be given to the availability of the procedures; encourages more rigorous Congressional oversight of Presidential application of the legislation; and urges that judicial review be sought when the administration refuses to act in response to clear violations.[120] Mandel's proposals for reform are similar. In essence, he proposes the consolidation of the different programs so that there would be a single "International Worker Rights subcommittee . . . to carry out all worker rights reviews and determinations," and it would be empowered to choose which of the available sanctions to impose and to what extent.[121] Human rights groups would be permitted to present evidence at public hearings, and the "taking steps" language would be changed so as to distinguish between improvements in form and in substance.[122]

The recommendations contained in the 1991 report by the Lawyers Committee seek both to improve the existing procedures and to put them on some form of multilateral footing. In terms of the latter, it is suggested that the question of worker rights should be pursued more actively by the United States in the Uruguay Round context, and that "the expertise of the ILO should be utilized in determining the means to adapt the GATT to the promotion of worker rights."[123] The role envisaged for the ILO is thus rather marginal. But while emphasizing the desirability of these measures, the Lawyers Committee does not see them in any sense as a prerequisite to the continuation of the programs. Reforms which it advocates include: the creation of a specialist subcommittee, as recommended by Mandel; rendering mandatory the acceptance of any petitions alleging violations (it is discretionary at present); initiation of reviews by the administration rather than exclusive reliance upon the receipt of petitions to trigger a review; and introduction of greater flexibility in terms of the sanctions that might be imposed.[124]

In general, however, most of the groups and commentators cited above seem to agree that the worker rights legislation, especially if revised to reflect limited procedural changes, constitutes a highly desirable aspect of US human rights policy. Yet, in view of the problems that have been identified in the analysis above, the question that arises is why criticism of the programs has been so limited and so muted? One explanation is that a low priority

120. *Trade's Hidden Costs*, *supra* note 1, at 55–57.
121. Mandel, *supra* note 1, at 478.
122. *Id.* at 477–81.
123. Lawyers Committee (1991), *supra* note 1, at 82.
124. *Id.* at 82–85.

is often attached to the need to ground advocacy and sanctions approaches in international standards. Another is that, outside of the US labor movement, there is very limited knowledge, or even awareness, of the ILO's international labor standards in any technical sense. Thus, the occasional invocation of that agency's name by the proponents of the US legislation seems to have been sufficient to allay any fears of inconsistency between the two sets of standards. Similarly, the ILO's structure and procedures are sufficiently unknown in the United States as to deter any serious proposals to make more effective use of the opportunities that might exist. A third, and related, explanation is that most of the groups have evaluated the worker rights legislation only in terms of its objectives rather than also in terms of the means by which those objectives are to be sought.

B. Trade and Human Rights Issues Should Be Kept Separate

It has often been argued that human rights issues ought to be kept entirely separate from matters of aid, trade, and international development policy. This was an argument often put forward in relation to trade matters in the context of opposition to the impositions of US sanctions against South Africa over its policy of apartheid. It also continues to be heard, even today, in international forums when proposals are made to take account of human rights performance in determining the type and extent of development cooperation that a given country might receive. Thus, for example, the United States has strongly opposed discussions of development issues within the UN Commission on Human Rights,[125] while the Group of 77 took a similar position when human rights matters were raised in the activities of the UN Development Program (UNDP).[126]

But the international community has already become significantly more sophisticated than such positions would lead one to expect. Many forms of linkage are now recognized to be not only appropriate but inevitable. The World Bank, the International Monetary Fund, and the UNDP have all adopted measures of one kind or another which recognize that human rights performance ought to be a factor in their respective decisionmaking.[127]

This type of linkage is nothing new. While this is not the place to embark upon a detailed historical analysis of the place of economic factors in early human rights initiatives, it is appropriate to recall that early nineteenth century efforts to outlaw international slavery, as well as much of the concern

125. U.N. Doc. E/CN.4/1991/SR.19, paras. 9–10 (1991).
126. *Statement by H.E. Dr. Kofi Awoonor, Ambassador and Permanent Representative of Ghana in the General Debate of the UNDP Governing Council* 2–3 (11 June 1991).
127. *See generally*, Philip Alston, *Revitalising United Nations Work on Human Rights and Development*, 28 Melbourne U. L. Rev. 216 (1991).

to protect the rights of aliens (especially when they were representing US business in South America), were strongly supported by economic considerations. Similarly, there is an even more direct analogy to be drawn between the current US worker rights initiatives and the concerns that gave rise to the creation of the International Labour Organisation. The increasing clamor for improved working conditions on the part of trade unions and socialist groups in Europe and the United States in the aftermath of the First World War, combined with the growing importance of export markets, created a powerful incentive for international efforts to ensure that minimum labor standards were met by all countries engaging in international trade. Thus, when the ILO was created in 1919, one of its greatest attractions, at least as far as its Western protagonists were concerned, was its role in promoting standards designed to improve minimum working conditions. Thus, although the phrase was not then in vogue, one of the key objectives of the ILO was the creation of a "level playing field." As a result, the preamble to the ILO's Constitution of 1919 explicitly proclaimed that "the failure of any nation to adopt humane conditions of labor is an obstacle in the way of other nations which desire to improve conditions in their own country."[128]

C. The Legislation is Not Really Human Rights Motivated

The suggestion that the worker rights legislation is motivated by protectionist concerns with little or no genuine concern for human rights has often been made.[129] Proponents of the legislation have generally been enthusiastic in rejecting the suggestion. The Congressional hearings on the various programs are replete with protestations of legislative sponsors of their concern with reducing some of the worst forms of exploitation of foreign workers. In 1984, for example, a report by the House Ways and Means Committee stated:

> The denial of internationally recognized worker rights in developing countries tend [sic] to perpetuate poverty, to limit the benefits of economic development and growth, to narrow privileged elites, and to sew [sic] the seeds of social instability and political rebellion.[130]

Most subsequent analyses of the various programs have followed much the same line. Charnowitz has suggested two objectives. The first is to respond to "a growing public concern about US abatement of foreign human rights violations," and the second is to support the "goal of promoting private

128. Constitution of the ILO, *supra* note 113, at preamble para. 3.
129. Thus, for example, the Deputy USTR told Congress in 1987 that many countries see "the issue of worker rights as a trojan horse for protectionism." *Workers' Rights & Trade Adjustment Programs, Hearings on S.490 and H.R. 3 Before the Senate Finance Committee*, 100th Cong., 1st Sess. 57 (18 Mar. 1987)(Statement by Ambassador Michael B. Smith).
130. H.R. Rep. No. 1090, 98th Cong., 2d Sess. 11–12 (1984), *reprinted in* 1984 *U.S. Code Cong. & Admin. News* 5101, 5111 (1984).

sector development and democratization."[131] Similarly, Mandel has argued that "[t]he immediate US goal to be attained . . . is humanitarian: to improve the working conditions and rights of foreign labor."[132] Human rights legislation is rarely motivated by purely altruistic concerns.[133] Thus, even if it were possible to demonstrate convincingly that the worker rights programs have been driven by varied motives, some of which are undeniably protectionist, this fact would not of itself discredit them. Nevertheless, if it were to be shown that there is little or no congruence between US human rights policies on the one hand and its worker rights policies on the other, it would seem reasonable at least to question the authenticity of the purported human rights motivation. There are, in fact, several such incongruities. In the first place, worker rights must be characterized, in UN parlance, as economic and social rights. All of the issues addressed in the list of worker rights set out in the relevant US legislation are reflected specifically in the International Covenant on Economic, Social and Cultural Rights. Yet, both the Reagan and Bush administrations have explicitly repudiated the rights recognized in that Covenant.[134] As one senior spokesperson put it, "[t]he United States sees these socioeconomic 'rights' as the goals of sound policy rather than as true human rights."[135] The US Representative to the UN Commission on Human Rights adopted the same position in 1991, arguing that to equate "these social welfare goals" with true human rights "tends to dilute the meaning of rights and distract attention from human rights abuses."[136] It would seem incongruous at best, and nonsensical at worst, for the United States to be unreservedly rejecting economic and social rights in one context and unilaterally insisting upon their observance by other states in another.

The second incongruity relates to the United States' rejection of the Havana Charter in 1947, partly because of the inclusion of worker rights provisions against its wishes.[137] Although, in the negotiations for the Uruguay

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131. Charnowitz, *Fair Labor Standards and International Trade*, *supra* note 1, at 61–62.
132. Mandel, *supra* note 1, at 443.
133. On the important role of hypocrisy in this general context, see Louis Henkin, *The Age of Rights* (1990).
134. *See generally*, Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 Am. J. Int'l L. 365 (1990).
135. Williamson, *supra* note 95, at 115.
136. Morris B. Abram, *Human Rights and the United Nations: Past as Prologue*, 4 Harv. Hum. Rts. J. 69, 78 (1991).
137. The Havana Charter included a detailed provision which would have committed ratifying States to ensure that fair labor standards were promoted in international trade. The provision stated in part:

> The Members recognize that measures relating to employment must take fully into account the rights of workers under inter-governmental declarations, conventions and agreements. They recognize that all countries have a common interest in the achievement and maintenance of fair labor standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit. The Members recognize that unfair labour conditions, particularly in production for export, create difficulties in international trade, and, accordingly, each Member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory.

Round, the United States has adopted a formal position in favor of a worker rights clause, no equivalent initiative has ever been launched by the United States in the international forum in which it is much more likely to gain support: the ILO.

Thirdly, the Reagan and Bush administrations have consistently argued, and Congress has tended to agree, that sanctions should only be used as a last resort in response to human rights violations.[138] Yet, in marked contrast, the worker rights legislation opts for the imposition of sanctions, albeit on a discretionary basis, as the principal form of response to perceived violations of worker rights. That approach would seem to be designed less to achieve the cessation of human rights abuses than to bring offending states to the negotiating table so as to improve the relative trade position of the United States vis-a-vis those states.

In brief, it is difficult to reconcile the approach adopted in the worker rights programs to those which have characterized US human rights policy over the past decade or so. This fundamental inconsistency must at least give rise to very serious questions as to the authenticity of the oft-cited human rights goals of the programs in question. In fairness, however, it must be pointed out that the Reagan administration actually opposed the worker rights programs on various grounds, including: (1) a fear that other countries would retaliate in response to US action; (2) concern that determinations would necessarily be subjective; and (3) a preference for a negotiated response rather than sanctions.[139] Nevertheless, neither it nor its successor has moved to repeal, or substantially amend, the offending provisions.

D. The Worker Rights Approach is Unlikely to Achieve Human Rights Goals

There is little doubt that the worker rights legislation will, over a period of time, contribute to the adoption of reforms in a number of states. In particular, those states that are significantly dependent on access to the US market, and in which legislative or administrative changes can be achieved at rel-

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United Nations Conference on Trade and Employment, held at Havana, Cuba from November 21, 1947 to March 24, 1948, Final Act and Related Documents, at 7, U.N. Doc. E/CONF.2/78 (1948)(art. 7(1)). On the reasons for the failure of the Havana Charter to achieve the support required to enter into force, see Richard Gardner, *Sterling-Dollar Diplomacy in Current Perspective: The Origins and the Prospects of Our International Economic Order* (1980).

138. For a review of the reluctance of the two Administrations to endorse sanctions in two important cases, see Holly Burkhalter, *Bargaining Away Human Rights: The Bush Administration's Human Rights Policy Towards Iraq and China*, 4 Harv. Hum. Rts. J. 104 (1991). See also more generally Human Rights Watch, *World Report 1992* (1991).

139. *See generally, Testimony of Ambassador Michael B. Smith, Deputy US Trade Representative, Before the Committee on Finance, US Senate, 18 Mar. 1987*, 59–60, cited by Ballon, *supra* note 1, 119–20.

atively little real cost, can almost certainly be persuaded to comply with some of the "suggestions" emerging from the worker rights review process. In addition, the legislation provides yet another means by which pressure can be applied against governments which are *non grata* with the United States, for either ideological or human rights reasons (or, more likely, both). But the question that remains is whether the ends justify the means.

Proponents of the legislation will probably be tempted to point to the Jackson/Vanik Amendment[140] as an illustration of the success that trade-related incentives and disincentives might have on the human rights conduct of target states. The almost complete reversal of Soviet human rights and immigration policies would seem to lend particular force to this analogy. But even without considering the very complex issue of the precise causal relationship between the Amendment and the reforms,[141] it seems inappropriate to pursue this analogy. The Amendment was based on an internationally recognized right to leave one's own country and related to an obligation that the Soviet Union had unequivocally accepted when it ratified the International Covenant on Civil and Political Rights.[142] Thus, both the content of the norm and its applicability to the Soviet Union under international law were beyond dispute. Such is not the case with respect to the worker rights legislation.

Thus while acknowledging that the worker rights provisions are likely to have a positive impact on labor rights in certain situations, that impact must be weighed against the negative consequences of the legislation. Moreover, it must be asked whether alternative approaches might be available which would be reasonably effective at a lower negative cost.

E. The United States Should Not Apply Standards to Other States that It has Failed to Ratify Itself

This argument was a favorite refrain of countries that were the targets of US human rights criticism or sanctions in the 1970s and 1980s, and was advanced with particular gusto by the (then) socialist countries of Eastern Europe.[143] But before considering its merits in the present context, it is appropriate to examine the US ratification record with respect to the ILO

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140. Trade Act of 1974, *supra* note 6, at § 402.
141. *See generally*, Dow, *Linking Trade Policy to Free Emigration: The Jackson-Vanik Amendment*, 4 Harv. Hum. Rts. J. 128 (1991).
142. International Covenant on Civil and Political Rights, art. 12, *adopted* 16 Dec. 1966, *entered into force* 23 Mar. 1976, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16), at 52, U.N. Doc. A/6316 (1966).
143. See, for example, the highly critical memorandum presented on behalf of nine Socialist countries at the 1983 International Labour Conference. Int'l Lab. Conf. 1983, *Record of Proceedings* 7/18.

Conventions that are cited as the basis for the worker rights programs.

As of 1 January 1992, the ILO had adopted a total of 173 Conventions, not all of which deal directly with human rights per se. For analytical purposes, the ILO has divided its standards into thirteen categories, the first of which deals with "basic human rights."[144] Under that heading, a total of eleven conventions are listed under the sub-categories of freedom of association, forced labor, and equality of opportunity and treatment. It is generally acknowledged that the older group of conventions, adopted between 1921 and 1958, constitute a basic minimum core in human rights terms. They are, in general, among the most widely ratified, the most frequently invoked, and the most important in providing a basis for other, subsequent, standards. Those treaties are:[145]

Freedom of Association
- Right of Association (Agriculture) Convention, 1921 (No. 11);
- Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); and
- Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

Forced Labor
- Forced Labour Convention, 1930 (No. 29); and
- Abolition of Forced Labour Convention, 1956 (No. 105).

Equality of Opportunity and Treatment
- Equality of Remuneration Convention, 1951 (No. 100); and
- Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

As of January 1992, the United States had ratified only Convention No. 105 on the Abolition of Forced Labour, which it ratified in September 1991.

The AFL/CIO and various human rights groups have frequently called upon the United States to ratify these basic human rights conventions and have warned of the greatly diminished credibility of the United States as a human rights defender in the absence of such action.[146] But the longstanding position of the US government is that, "although an improved record of

144. *See* International Labour Organization, *supra* note 43, at xiii.
145. *Reprinted in* International Labour Organization, *supra* note 43, at, respectively, 3, 4, 7, 29, 39, 42, and 47. Of the eleven, the treaties not listed are: the Workers' Representatives Convention, 1971 (No. 135); the Rural Workers' Organizations Convention, 1975 (No. 141); the Right of Association (Non-Metropolitan Territories) Convention, 1947 (No. 84); and the Labor Relations (Public Service) Convention, 1978 (No. 151). They are reprinted in *id.* at, respectively, 9, 15, 907, and 25.
146. *See, e.g., The United States and the International Labor Organization: Twenty-Sixth Report of the Commission to Study the Organization of Peace* 22 and n.14 (1979).

ratification [is] an important objective towards which to strive," the important fact is that "in practice United States law [meets] or [exceeds], in almost every case," the standards which are set out in the international labor conventions.[147] Consistent with this approach, the leading worker rights advocacy group has suggested that the US failure to ratify is of little relevance:

> The US Congress has long been reluctant to ratify international accords that will constrain US laws. For example, the Congress has never ratified the major GATT rules. It has nonetheless generally complied with GATT rules as though they were binding. Concerning worker rights, the important point is that the United States has adopted and enforced domestic laws that guarantee each of the five basic rights and standards enumerated in the legislation.[148]

The analogy between the GATT[149] and international labor conventions is dubious at best, given that the GATT is generally accepted as having the force of a treaty in US law.[150] But, leaving that issue aside, it is the reluctance of the United States to subject itself to internationally binding "constraints" which lies at the very root of the problem. Any state can assert that its own laws conform to international standards, but such assertions are unconvincing when there is no element of international accountability and no regular independent reviews of the laws undertaken. This issue is of particular relevance in the US case in light of the position of the Washington-based Labor Policy Association that the provisions of some of the basic ILO human rights conventions are actually in direct conflict with US law, and that their ratification would require a number of major amendments to that law.[151] But, in any event, the shortcomings are more likely to arise in the practical policies adopted to implement the relevant legislation rather than in the laws themselves. Thus, even the perfect conformity of US laws with international standards would not suffice to cure the defects flowing from nonratification.

This is not the place to examine the various justifications which are sometimes cited in defense of US nonratification of ILO Conventions. It may be noted, however, that the suggestion that fear of federal intrusion upon state labor domains, which is often identified as the main problem,[152] is a curious justification when viewed alongside US insistence that other nations that have not ratified the conventions must nevertheless comply with the

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147. *Report of the Committee on the Application of Standards, International Labour Conference, 76th Session, Geneva, 1989* 26 Prov. Rec., 26/4, para. 10 (1989) (statement by US government member).
148. *Trade's Hidden Costs*, *supra* note 1, at 7.
149. *See supra* note 18.
150. *See generally*, John H. Jackson, *The General Agreement on Tariffs and Trade in the United States Domestic Law*, 66 Mich. L. Rev. 249 (1967).
151. Potter, *Freedom of Association, the Right to Organize and Collective Bargaining: The Impact on U.S. Law and Practice of ILO Conventions No. 87 & No. 98* 92 (1984).
152. *E.g.*, Stephen J. Schlossberg, *United States' Participation in the ILO: Redefining the Role*, 11 Comp Lab. L. J. 48, 66 (1989).

standards the conventions contain.[153] Moreover, other federal states have found no problem in ratifying most of the basic human rights conventions.[154] Australia and Germany, for example, have ratified all seven conventions, while Canada has ratified four of them.

The US record in agreeing to be formally bound by the same standards that it purports to be applying to other states is thus rather poor, both in absolute and comparative terms. When the United States is speaking out, or taking action, in response to violations of those human rights that are the subject of *erga omnes* obligations, the discrepancy between its poor record of human rights treaty ratification and its proselytizing stance is of no great import, apart from the few propaganda opportunities thereby afforded to its ideological adversaries. But in relation to worker rights, which are not yet the subject of such obligations, it is apparent that the United States would be acting on much stronger and certainly more persuasive grounds if it were itself a party to the relevant international conventions and if those were the standards being applied. Instead, what emerges is a major discrepancy between the United States' refusal to submit itself to multilateral accountability (through the ILO), and its preparedness to subject others to a form of accountability in which the United States acts as the sole legislator, judge, jury, and enforcement authority. Whatever the formal merits of the US position might be, any claim to be acting wholly in good faith is, under the circumstances, difficult to sustain. In this respect it would seem that the following assessment by Robert Hudec of the provisions of the 1988 version of section 301 of the Omnibus Trade and Competitiveness Act as a whole is fully justified in so far as the worker rights provisions are concerned:

> What is wrong with the new Section 301 is that it seeks to employ such authority for law reform objectives that . . . do not have the remotest claim to legitimacy. The heart of the problem is that the law is based on an outrageous premise—namely, that the commands of Section 301 do not apply to the United States.[155]

In the final analysis, protestations to the effect that the United States already conforms fully to the relevant standards will ring hollow until it is prepared to take the only steps that can effectively give substance to the claim: ratification of the ILO Conventions.

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153. It is also of questionable validity when read in conjunction with the formal "declaration of policy" inserted by Congress into the Fair Labor Standards Act. The declaration indicates that the policy is, "through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate" conditions "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." P.L. 75-518 of 1938; as amended by P.L. 101–157 and P.L. 101–583 § 202 (2)(a)-(b) (1990).
154. For a careful analysis of the issues, see Maupain, *Federalism and International Labour Conventions: Some Reflections Prompted by Two Anniversaries*, 126 Int'l Lab. Rev. 625 (1987).
155. Hudec, *supra* note 18, at 152.

IV. CONCLUSION

As noted at the outset, the great majority of commentators who have analyzed the US worker rights programs have been favorably disposed towards them. They have suggested the need for procedural reforms but have not concluded that the programs in their existing forms are unacceptable. The conclusion of the present analysis, however, is far less sanguine. It seems clear, on the basis of experience to date, that the legislation is aimed almost exclusively at improving the US trading position, a goal which in itself is not inappropriate. It does not follow, however, that international lawyers should be supportive of it without weighing very carefully any adverse consequences it might have in human rights terms.

From the perspective of international human rights law, the programs are not only seriously flawed in the specific ways described above but also have the potential, over the longer term, to undermine significantly both the standards and the procedures which together make up the labor rights regime that the international community has devoted most of the twentieth century to establishing and developing. The key question that remains to be answered is whether it might be possible to redesign the US worker rights programs in such a way as to make them compatible with, and even complementary to, that regime. The advantages of such an approach are obvious. As Oscar Schachter noted in 1978 in relation to human rights-inspired sanctions:

> When such judgments are made by the United States unilaterally, they are likely to be perceived by others as political and self-interested. To avoid this negative perception, one would have to have impartial international procedures founded on adequate inquiry and international criteria of some specificity.[156]

The position of the Reagan administration appears to have been consistent with this approach. In objecting to the worker rights provisions, its representatives consistently drew attention to the problems of acting unilaterally, to the problems flowing from not using internationally acceptable standards, and to the need to demonstrate that protectionism was not the sole driving force.[157]

But while a system which depends significantly upon multilateral standards and procedures makes good sense in theory, it must be asked whether it is feasible in practice. Although such approaches have been outlined before by different commentators, including the present writer,[158] it has to be acknowledged that, in this and other fields, multilateralism has always tended

156. Oscar Schachter, *International Law Implications of U.S. Human Rights Policies*, 24 N.Y. L. Sch. L. Rev. 63, 87 (1978).
157. *E.g.*, testimony by Ambassador Smith, *supra* note 129.
158. Philip Alston, *International Trade as an Instrument of Positive Human Rights Policy*, 4 Hum. Rts. Q. 155 (1982).

to attract considerably more than its fair share of idealistic but naive and largely impractical proposals. There is good reason to think, however, that a multilateral effort to promote fair labor standards in the context of international trade should not be lightly dismissed.

Perhaps one of the strongest indications of the proposal's feasibility in both practical and institutional terms is the fact that more than one ILO director-general has drawn attention to the opportunities that already exist for investigation of unfair labor practices and has also suggested that *ad hoc* conciliation procedures might be initiated in this context. Such a proposal was first put forward in 1973,[159] and was reiterated with a significant degree of specificity in 1988.[160] On the latter occasion, the Director-General even indicated a preparedness to draft a composite set of labor standards that might be used specifically for this purpose.[161] Yet the United States has taken no action to activate such procedures or to propose entirely new mechanisms within the ILO framework which could resolve specific disputes over worker rights issues when they arise in a bilateral (or multilateral) trade context. Although it has made an effort in the Uruguay Round negotiations, its trading partners have apparently all assumed that its proposals were a form of very thinly concealed protectionism.[162] But there are strong reasons for doubting whether the GATT is the most appropriate forum in which to pursue such an initiative. It has no existing role or expertise in relation to labor standards, no readily adaptable institutional arrangements for this purpose, and none of the ILO's experience in fact-finding, conciliation, the exertion of pressure, and the provision of technical cooperation in the field of labor policy. Thus the prospects of successfully developing a multilateral worker rights program would appear far greater in the ILO, a fact which might lead a cynic to suggest explanations why no initiative has been taken by the United States in that forum.

Finally, it must be emphasized that even if the United States is unable to obtain satisfaction in this matter from the ILO, there remain a number of measures that could be taken by Congress both to make its worker rights programs more convincing and acceptable in the eyes of its trading partners as well as to reduce greatly the potential harm that the programs might cause to the international labor rights regime. Such measures include: (1) the ratification of some, if not all, of the ILO's basic human rights conventions; (2) encouragement of its trading partners to ratify the same conventions, combined with technical assistance, if requested, to facilitate ratification;

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159. *Prosperity for Welfare: Social Purpose in Economic Growth and Change—The ILO Contribution*, Report of the Director-General, Pt. 1, International Labour Conference, 58th Sess., Geneva, 39 (1973).
160. *Human Rights—A Common Responsibility*, Report of the Director-General, International Labour Conference, 75th Sess., Geneva, 57–62 (1988).
161. *Id.* at 58.
162. *See* Lawyers Committee (1991), *supra* note 1, at 68–69.

(3) the use of the standards contained in those ILO conventions as the basis for the worker rights programs; (4) the consistent use of ILO-generated information in assessing the situation in a given state; (5) the opening up of opportunities for any interested parties to participate in the hearings dealing with alleged violations; (6) the preparation of clear and detailed reports listing the practices pursued or tolerated by the governments under scrutiny and which are unacceptable from a worker rights perspective; (7) the removal of the excessively indulgent flexibility arrangements for developing countries; and (8) the reduction of the President's discretion by requiring reasons to be given for decisions and by providing an opportunity to appeal those decisions.